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# Protection of Fundamental Rights in Estonian Criminal Law

## 1. Bases

Personal fundamental rights stand for the rights directly stemming from human dignity and expressing the constitutional legal status of a person. Emanating from the principle of human dignity the rights of an individual must guarantee his or her free development in his or her personal sphere of life and the inviolability of his or her personal or private sphere of life.

Attempts to classify personal rights or distinguish them according to their level can be noticed in specialist literature. For example, some authors have tried to distinguish a personal right in a narrower sense of the term (a personal right as the legal status directly connected with human dignity) from the ones in a broader sense (personal rights as the constitutional legal status).<sup>1</sup>

An attempt to present personal fundamental rights as a kind of hierarchy is also connected with the aforesaid. For example, firstly, comes the right to life and personal inviolability; secondly, the freedom of thought, conscience and religion; and thirdly, fundamental rights that stem from the principle of a state based on the rule of law (or political freedoms in a broader sense of the term) — the rights to constitutional state order, free political competition and independent administration of justice.<sup>2</sup>

A question in itself is whether human dignity has to be treated as an independent fundamental right. Those who consider it a fundamental right think that human dignity should always be at the top, always the first in the hierarchy of all human rights. Another position (and in my opinion more grounded, at least from the point of view of the

protection in criminal law) holds that human dignity is the foundation of the person's legal status and the base of all rights that have different outputs as to the protection in criminal law. Arguments for the latter lie in the fact that human dignity is philosophically defined and, in this form, as a specific right hard to apply.<sup>3</sup>

In Estonian constitutional law the question of human dignity has remained in the background. For example, if § 1(1) of the German Constitution places human dignity to the top of the value system of human legal order then the Estonian Constitution mentions human dignity only in § 10 of Chapter II ("Fundamental Rights, Freedoms and Duties") pursuant to which fundamental rights, freedoms and duties do not preclude other rights, freedoms and duties that conform to the principles of human dignity.<sup>4</sup> But what can be derived from this provision is that human dignity is not a specific right but a general base from which other fundamental rights originate.

## 2. System of Fundamental Rights from the Point of View of Protection in Criminal Law

Classification and hierarchy of personal fundamental rights is substantially the problem of political law. The problem in criminal law is how to define legally protected interests or more precisely, whether and which fundamental right and freedom can be protected as an interest of independent quality or just as an expression of the person's legal status. Here, in my opinion, there are three possible levels.

1. Fundamental rights or freedoms as independent

interests. For example, the rights to life and personal integrity are protected as independent interests, not as rights. The same applies to the right of one's good name or the right to one's adequate presentation (the right to one's "picture") - this is protected as honour (by the *corpus delicti* of insult and defamation). One of the expressions of intimate sphere, sexual sphere, is also protected as an independent interest (sexual offences). By this criminal law wants to say that the object of the right or the interest itself rather than the belonging of the right to a person (the right to life) is essential.

2. Realisation of personal fundamental rights in a certain sphere that itself forms an independent and, from these aspects, more important legal interest than the right of an individual. For example, inviolability of a person or his or her good name may be blemished by acts that are performed in the sphere of administration of justice (false accusation and unlawful arrest) and that are incorporated in the chapter on offences against the administration of justice (§§ 170 and 174 of Chapter IX of the Special Principles of the Criminal Code). Personal integrity and health may be damaged by the excess of powers (§ 161<sup>1</sup>) that is a malfeasance, and others.

3. In between these two levels there are many other constitutional rights that, in essence, just emphasise the person's constitutional legal status and that are of importance from the aspects of protection in criminal law as person's **rights** as legal categories — the right to privacy, copyright, rights pertaining to one's profession, political rights and others.

The boundaries between these three levels are relative and depend on the systematics of the special part of the criminal code of an individual state. The catalogue of fundamental rights in itself proceeds primarily from two basic acts — the constitution of a state and the European Convention on Human Rights (hereinafter: "ECHR"). But hitherto the systematics of criminal law has not elaborated firm criteria for incorporating personal fundamental rights in the system of the special part of the criminal code. This means that the norms protecting the pertinent rights may be found in different chapters of the code.

### 3. Protection of Fundamental Rights in a Self-contained Chapter

#### 3.1. LAW IN FORCE

The valid Criminal Code contains a separate chapter that directly deals with personal rights — Chapter V of the Special Principles entitled "Offences Against the Person's Political Rights and Rights Pertaining to His or Her Profession". If we take paragraph 2c of the aforementioned classification as the basis, then we can say that most of the *corpora delicti* protecting fundamental rights are inserted in this chapter.

Constitutionally protected rights in the pertinent chapter of the Criminal Code and norms of criminal law corresponding to them can be classified in the following way: pursuant to the Criminal Code and the catalogue of fundamental rights in the Constitution of the Republic of Estonia (Chapter II entitled "Fundamental Rights, Freedoms and Duties").

1) Suffrage: Chapter II of the Constitution does not provide for such a fundamental right but it can be derived from §§ 1 and 56; §§ 131 (hindrance of the exercise of the right to vote), 132 (forgery of voting), and 132<sup>1</sup> (defamation of a candidate) of the Criminal Code.

2) The right to inviolability of one's family and private life and the right to inviolability of the home: §§ 26 and 33 of the Constitution; §§ 133 (unlawful search or eviction), 133<sup>1</sup> and 133<sup>2</sup> (unlawful surveillance) of the Criminal Code.

3) The right to confidentiality of messages sent or received by commonly used means: § 43 of the Constitution; § 134 (the violation of confidentiality of messages sent or received by commonly used means) of the Criminal Code.

4) The freedom of criticism: the Constitution does not directly foresee it but it can be derived from §§ 41 (the freedom of opinions and beliefs) and 46 (the right to address agencies with petitions); § 134<sup>1</sup> (persecution of a person criticising someone or something) of the Criminal Code.

5) The right to secure work conditions: § 29(4) and indirectly also § 28 of the Constitution; §§ 135 (violation of occupational safety and health rules as a general *corpus delicti*), 206, 206<sup>3</sup> and 206<sup>4</sup> (violation of occupational safety and health rules in enterprises using dangerous technologies) of the Criminal Code.

6) The copyright: § 39 of the Constitution; Chapter XV of the Special Principles of the Criminal Code entitled "Offences Against Intellectual Property" (§§ 277-284).<sup>5</sup>

7) The freedom of religion: § 40 of the Constitution; § 138 (hindrance of the performance of a religious ceremony) of the Criminal Code.

#### 3.2. DRAFT CRIMINAL CODE

The draft uses here a double system (see also the aforementioned paragraph 2): the protection of rights stemming directly from human dignity is guaranteed by the *corpora delicti* contained in the chapter on offences against the person (Chapter V) and personal rights in a broader sense of the term are secured by a self-contained chapter (Chapter VI) entitled "Offences Against Social Rights". Chapter V embodies the following divisions: offences against life (Division I), offences against health (Division II), offences against honour (Division III), illegal abortion (Division IV), unlawful treatment of an embryo (Division VI), offences against liberty (Division VIII), offences against sexual self-determination (Division VIII) and

offences against the deceased (Division IX). Offences against social rights can be divided into offences against equality of rights (Division I) — instigation of social hostility and violation of equality of rights; violations of fundamental rights (Division II) — the *corpora delicti* embodied in it deal with the freedom of religion, confidentiality of personal data, freedom of assembly and association; offences against suffrage (Division III) — hindrance of the exercise of the right to vote, forgery of voting, purchase of a vote, deception of voting, hindrance of agitation and unlawful agitation.

#### 4. Protection in Other Chapters of the Special Principles of the Criminal Code

In addition to the rights and freedoms protected by a self-contained chapter, the following rights are protected as specific interests (see the aforementioned levels 2.1. and 2.2.):

1) equality of rights: § 12 of the Constitution; §§ 72 (instigation of national, racial, religious or political hatred or violence) and 72<sup>1</sup> (violation of equality of rights) of the Criminal Code;

2) the right of assembly: § 47 of the Constitution; § 76<sup>2</sup> (unlawful public meeting) of the Criminal Code;

3) the right to life: § 16 of the Constitution; §§ 100-106 (homicide and causing suicide) and 120 (illegal abortion) of the Criminal Code;

4) the right to personal integrity and health: § 18 and indirectly also § 28 of the Constitution; §§ 107-114, 119, 119<sup>1</sup>, and 119<sup>2</sup> (infliction of bodily harm, infecting with a venereal disease) of the Criminal Code;

5) sexual freedom: indirectly § 18 of the Constitution; §§ 115-118 (rape, sexual intercourse with a minor and other sexual offences) of the Criminal Code;

6) the protection of one's family and of a child: § 27 of the Constitution; §§ 121-124 (violation of maintenance liability, misuse of the guardianship right) of the Criminal Code;

7) the right to liberty and security of person: §§ 20 and 21 of the Constitution; §§ 124<sup>1</sup>-124<sup>3</sup> (unlawful taking of one's liberty and taking of hostages) of the Criminal Code;

8) the right to personal confidentiality: indirectly § 26 of the Constitution; §§ 128<sup>1</sup> and 276 2) (disclosure of professional secrets) of the Criminal Code;

9) the right to one's good name or honour: § 17 of the Constitution; §§ 129 and 130 (defamation and insult) of the Criminal Code;

10) the right to property: § 32 of the Constitution; §§ 139-145<sup>2</sup> or the entire Chapter VI of the Special Principles ("Offences Against Property") of the Criminal Code;

11) the right to healthy environment: § 53 of the Constitution; §§ 154<sup>3</sup>-158<sup>3</sup> (illegal felling of timber, illegal fishing, pollution of a water body and air and other

offences against environment) of the Criminal Code;

12) the right to protection against arbitrary action of an official: § 13(2) of the Constitution; §§ 161 and 161<sup>1</sup> (misprision) of the Criminal Code;

13) the right to fair trial: §§ 22-24 of the Constitution; §§ 168-171 (unlawful adjudication, unlawful arrest, compulsion to testify) of the Criminal Code;

14) the right to inviolability of one's dwelling: § 33 of the Constitution; § 195<sup>2</sup> (arbitrary trespassing on other people's room or fenced territory) of the Criminal Code.

#### 5. *De lege lata et ferenda* Protection of Specific Fundamental Rights

I am not going to analyse the entire system of protection of fundamental rights in criminal law because these problems would go beyond the scope of one article. I would rather try to analyse the protection of some rights with the aim to determine certain important tendencies that would help to characterise the development trends of the Estonian criminal law in the issue under discussion.

The Estonian Criminal Code currently in force stems basically from the 1961 Criminal Code of the Estonian Soviet Socialist Republic that was amended by the criminal law reform of 1992. Although the work on elaborating a new draft criminal code started immediately after that the entire text of the draft has been completed only recently.

##### 5.1. THE RIGHT TO LIFE

a) **An embryo as the bearer of human life.** In Estonia, artificial insemination and the protection of an embryo are regulated by the pertinent Act of 11 June 1997.<sup>6</sup> As to the protection of an embryo, the Act confines itself only to a pre-implantation or pre-nidation embryo — an embryo at the blastocyst stage of development — and the standpoint that we have to deal with an embryo as of the moment of the fertilisation of the ovum is taken as the basis (§ 3).

The legal protection of an *in utero* embryo can be equalised to the legal protection of human life and human dignity or at least it directly proceeds from it. But a pre-implantation embryo is a specific legal interest that is not equal to human life and the legal protection of which is not based on the existence of human dignity. An embryo becomes the bearer of human dignity after its implantation since when an embryo is at the specific stage of development and develops as a specific person. The Embryo Protection and Artificial Insemination Act does not regulate the protection of an embryo at the latter stage because the storage of an *in vitro* embryo for more than 14 days is forbidden (§ 34). But *in utero* foetus is legally protected by the abortion rules and corresponding provision of the Criminal Code (see paragraph 5.1.b).

By the implementation provisions of the Act two pertinent *corpora delicti* were inserted into the Criminal Code.

§ 120<sup>1</sup> of the Criminal Code establishes the responsibility for the transfer of the ovum or the resulting embryo to the woman that is performed contrary to the Embryo Protection and Artificial Insemination Act as well as the responsibility for the private mediation of the corresponding transfer; § 120<sup>2</sup> criminalises the forbidden procedures: sex selection, cloning, the creation of chimeras and hybrids.

Pursuant to the new draft Criminal Code the corresponding offences form a self-contained division (Division VI entitled “Unlawful Treatment of Human Embryo”) in Chapter V dealing with offences against the person. In addition to the aforementioned procedures, the damaging and maltreatment of an embryo (the creation of an embryo without the aim of transferring it to a woman, and ectogenesis) are also criminalised.

**b) Illegal abortion and the protection of life in criminal law.** Consideration of illegal abortion as an offence against life reveals the author’s opinion but that is not in compliance with prevailing law dogmatics. The pertinent provision is placed in the chapter on offences against the person (§ 120 of the Criminal Code) but Soviet criminal law dogmatics regarded it mostly as an offence **endangering** the woman’s life or health. Different opinions on the object of abortion have been expressed in legal literature mentioning, in addition to the life and health of a woman, also a foetus, pregnancy as the process of genesis and development of human life, increase in population, health of the contemporary and future generations and others as objects of abortion.<sup>7</sup> For example, in the Criminal Code of the former DDR the *corpora delicti* of abortion were placed in Chapter IV (“Offences Against Minors and the Family”) of the Special Part. This position was grounded by the assertion that in so far as abortion is not directed at a living human being but at the life that is only coming into being then the pertinent offence prejudices primarily the interests of the future generations.<sup>8</sup>

The issue of abortion itself is at present regulated by the Abortion and Sterilisation Act that is based on a so-called time limit version allowing abortion by a woman’s own wish until the 12th week of pregnancy if no medical contraindications exist, and in the 12th-20th week of pregnancy if the pertinent indications are present.<sup>9</sup> It should be mentioned that the 1996 Criminal Code of the Russian Federation is also based on the hitherto existing regulation and § 124 thereof does not essentially differ from its predecessor whereat the object of an offence is claimed to be the woman’s health.<sup>10</sup>

The *corpus delicti* of illegal abortion contained in the valid Estonian Criminal Code is based on the new Abortion Act (i.e. on the time limit version). Abortion is illegal and criminally punishable if it is performed later than prescribed (§ 120(1)) or by a person who has no right to perform it (§§ 120(2) and (3)). New provisions foresee

responsibility for the termination of pregnancy contrary to the will of a pregnant woman (§ 120(4)) as well as for sterilisation contrary to the will of a person (§ 120(5)). The principle that a woman herself is not responsible for illegal abortion is retained.

Generally the same regulation is retained in the draft Criminal Code in which illegal abortion forms a separate division (Division V) in the chapter on offences against the person (Chapter V). However, the draft Code establishes that a woman herself is also responsible for allowing the abortion. The author of the latter chapter in draft Code is of the opinion that in the case of malicious abortion, i.e. against the woman’s will, two legal interests are attacked — the right of a woman to have a baby and the right of a foetus to life. If the pregnancy is terminated at the woman’s will, but at the same time illegally and the duration of pregnancy is not more than 20 weeks then on the assertion (in my opinion on a very disputable assertion) of the author of the draft it is not an offence against the life of a foetus but against the health of a woman; in this case, as regards the foetus, its dignity or more precisely its right to die with dignity can be seen as the injured interest. But if a pregnancy of more than 21 weeks is terminated then we have to deal with the offence against the life of a foetus.<sup>11</sup>

According to the draft, sterilisation against the person’s will is not regarded as a *delictum sui generis* but as an act in the *corpus delicti* of unlawful medical treatment contained in the division pertaining to offences against liberty (Division VII of Chapter V).

## 5.2. THE RIGHT TO LIBERTY

Subsection 20(1) of the Constitution of the Republic of Estonia establishes the right to liberty and security of the person. Security of the person protected in criminal law means here only general security that is based on the aforementioned subsection of the Constitution — the right to liberty and security of the person. Other freedoms are protected in criminal law by the provisions incorporated in other chapters of the Special Principles of the Criminal Code. For example, sexual freedom is protected by the *corpus delicti* of rape and other sexual offences (§§ 115-118), the freedom of religion by the *corpus delicti* of § 138 (hindrance of the performance of a religious ceremony) and others.

Security of the person in the aforementioned meaning denotes a natural quality constituting the personal character of a human being to determine and control oneself.<sup>12</sup> Liberty as a legal interest must be interpreted as a social (although not a collective) interest — a so-called inter-social interest — differently, for example, from life as a **trans-social** interest the essence of which does not depend on social context and the protection of which is practically **absolute**. Thus, liberty as an interest must be interpreted as one the essence of which is comprehensible only in the social context and the protection of which is **relative** — freedom cannot be absolute because it can be realised only

in so far as it does not invade freedoms of other people.<sup>13</sup> Section 19 of the Estonian Constitution also states: “Everyone shall honour and consider the rights and freedoms of others ... in exercising his or her rights and freedoms ...”.

But this definition is too broad and therefore does not directly enable definition of a legally protected interest in criminal law. Rather, the broad definition can be regarded as a starting point or basic notion for the subsequent specification of the legal interest.

For the specific definition of a legal interest one must distinguish different aspects of security of person that give rise to different classifications. One of these aspects is the determination of freedom as **the general independence of person and as the freedom of movement**.<sup>14</sup> The first group would comprise, for example, kidnapping or deportation (compare §§ 234, 234a of the German Criminal Code), pursuant to the Estonian Criminal Code - threatening (§ 128), and pursuant to the draft Criminal Code - enslaving and conveying a person to the State that restricts security of person. The second group would contain the taking of the person's freedom of physical movement - his or her detaining, confinement into a closed room, also taking of hostages (§ 239 of the German Criminal Code; §§ 124<sup>1</sup> and 124<sup>2</sup> of the valid Criminal Code and similar *corpora delicti* in the draft Code). It should be mentioned that in existing criminal law the *corpora delicti* pertaining to security of the person are placed in the chapter on offences against the person while in the draft Criminal Code they form a separate 7th division (“Offences Against Liberty”) within that chapter.

### 5.3. PROTECTION OF THE FAMILY AND CHILDREN

**a) Offences against the family.** The right to the protection of the family and a child is embodied in § 27 of the Constitution. The Criminal Code currently in force does not contain a chapter on offences against the family, individual *corpora delicti*, such as a failure to perform alimony obligations (§§ 121 and 122) and abuse of guardianship or curatorship rights (§ 123), can be found in the chapter dealing with offences against the person (Chapter IV of the Special Principles).

But the draft Criminal Code incorporates a self-contained 7th chapter entitled “Offences Against the Family and Minors” the first division of which is entitled “Offences Against the Family” including, similarly to the existing law, the *corpora delicti* of the violation of maintenance obligation and abuse of curatorship rights. A novel *corpus delicti* is that of changing the relation of a child to his or her family — substitution of a child for another in order to get a false family relation or deprive someone of his or her family relation. Chapter VII also embodies the *corpus delicti* of stealing someone else's child. Consequently, it is presumed that the latter is the offence

against the family, not against the child.

**b) Offences against a child.** Offences against a child as a type of offence do not mean causing harm to a concrete child because in this case it would be the offence against the person, for example homicide. The prejudiced interest includes the child's status in family law as well as the parents' rights and duties to their child in family law.

These offences include the following *corpora delicti*: kidnapping of a child, abuse of family rights or parental power, or failure to perform custodian duties and others. Conditionally it could also include the failure to pay maintenance. For example, although the kidnapping is placed in Chapter XVIII (entitled “Offences Against Security of The Person”) of the Special Part of the German Criminal Code, then generally the freedom of a child (a baby and an infant practically do not have it and due to incapacity or restricted legal capacity the freedom thereof is legally restrained) is not considered the interest prejudiced by this offence. Instead, custody (*Sorgerecht*) and parental rights (the right of parents to legally and actually bring up their child) are regarded as the interest.<sup>15</sup>

In the valid Estonian Criminal Code there are two *corpora delicti* connected with the pertinent type: purchase or buying of a child (§ 123<sup>1</sup>) and substitution or stealing of a child (§ 124). As it has been mentioned, the failure to pay maintenance (§ 121) can conditionally be within this type as well as the abuse of guardianship and wardship rights (§ 123) in case these rights are abused with regard to the child. But the status of pertinent persons in family law (the corresponding rights) is the one that constitutes the legal interest attacked by these acts. The Supreme Court is also of the opinion that stealing of a child and kidnapping are different offences that attack different legal interests.<sup>16</sup>

The draft Criminal Code does not contain the above-mentioned group of offences. The pertinent *corpora delicti* are embodied either in the division pertaining to offences against the family or in the one pertaining to offences against a minor.

**c) Offences against a minor.** It is arguable whether there is such a type of offence at all in the meaning of the system of the Special Principles of the Criminal Code. Many offences may be directed against a minor whereat mostly some other interests are attacked and not a minor as such. For example, although **sexual** offences against a minor are directed against his or her normal development, still more important here is its direction against sexual development and in certain cases also against the sexual freedom of a minor.

The same applies, for example, to offences involving narcotics and pornographic offences. With regard to these offences, although they prejudice the normal development of a minor, another interest is more important — in the case of offences involving narcotics it is the health of the people, in the case of pornographic offences it involves moral

bases of the society and mental freedom of a person.

Nevertheless, for example in the case of pornographic offences and prostitution there is a clear tendency to connect these *corpora delicti* with the need to protect a minor. If this is taken as the basis then we do not have to deal, for example, with a pornographic offence in the meaning of the systematics of the Special Principles of the Criminal Code but with an offence against a minor.

Existing law is familiar with the following *corpora delicti*: involving a minor in a crime and prostitution (§ 202), inducing a minor to use a narcotic substance (§§ 202<sup>2</sup> and 202<sup>3</sup>) and *corpora delicti* that are connected with exploiting a minor in creating or distributing a pornographic work (so-called child pornography, §§ 200, 200<sup>3</sup>). All the aforementioned *corpora delicti* are situated in Chapter XI of the Special Principles of the Criminal Code entitled “Crimes Against the Public Order and Social Safety”. This very comprehensive and eclectic chapter reveals that the system of the Special Principles has been insufficiently elaborated in existing criminal law.

The Special Principles of the draft Criminal Code embody a self-contained chapter (Chapter VII) entitled “Offences Against the Family and a Minor”, whereat Division II of this chapter pertaining to minors is entitled “Offences Against Normal Social Adaptation of a Minor”. It should be mentioned that pornographic offences in the meaning of the draft Code are only the ones that are directed against a minor and included in the aforementioned division. The same position holds true to prostitution offences but here the draft Code makes one exception by incorporating one more *corpus delicti* in Division II (“Offences Against the Public Order”) of Chapter XII (“Offences Against Public Peace”) — the *corpus delicti* of enabling illegal activities by which the Code prescribes responsibility for the provision of rooms for the illegal use of narcotic substances, for illegal gambling and for prostitution.

#### 5.4. PROTECTION OF HONOUR IN CRIMINAL LAW

**a) Honour as a fundamental right.** Constitutional quality can be attributed to honour on two legal grounds — directly and indirectly. § 17 of the Estonian Constitution protects the person’s honour (no one’s honour and good name shall be defamed). Pursuant to article 10 of the ECHR freedom of expression may be restricted for the protection of the **reputation** of others. From this it can be derived that a good name or honour is a fundamental right in the meaning of both the ECHR and the Constitution of the Republic of Estonia.

Another way to consider honour as a fundamental right is to derive its quality from the notion of human dignity. Consequently, honour as a fundamental right is under protection as a part of human dignity. Human dignity as a fundamental right can be derived from § 10 (the rights set out in the Constitution do not preclude other rights that

conform to human dignity) and § 18(1) (no one shall be subjected to degrading treatment) of the Estonian Constitution.<sup>17</sup>

Thus, honour like other fundamental rights can essentially be derived from human dignity. But honour is merely one part of human dignity, an attribute belonging to the person and guaranteeing the person’s right to his or her good name.

**b) Factual and normative notion of honour.** As is known, the factual notion of honour is determined by two aspects of honour — by its internal and external aspects. In the first case honour means a **sense of honour**, self-dignity; in the second case — one’s good name, the reputation as it actually exists in the opinion of the holder of honour or other people. The Estonian Criminal Code currently in force is also based on the factual notion of honour — § 129 (defamation) protects external honour (dignity) or factual honour or honour in the objective sense of the term, while § 130 (insult) protects internal honour or the sense of honour (or honour in the narrower sense of the term) or honour in the subjective sense of the term.<sup>18</sup>

The normative notion of honour is based on the presumption that the person’s honour can be analysed from two aspects, namely, firstly, from **dignity of person** (derived in its turn from human dignity), and secondly, from the person’s moral and social behaviour. A justified claim of any person for the recognition and consideration of his or her dignity stems from these two factors. The person has the right to **demand** or presume that he or she **be estimated** in the way that he or she, on the basis of human dignity and his or her previous moral and social behaviour, i.e. he or she as a member of the society, **deserves**.<sup>19</sup> In Estonian criminal law and court practice the normative notion of honour has not rooted yet.<sup>20</sup>

**c) Existing law and the draft Criminal Code.** The valid Criminal Code contains two *corpora delicti* to this effect — defamation (§ 129) and insult (§ 130) — embodied in the chapter on offences against the person. The draft Code retains these *corpora delicti* placing them into a separate chapter — Chapter IV entitled “Offences Against Honour”. But differently from existing law the characteristics of these *corpora delicti* have been amended. Defamation is no longer “dissemination of deliberately false and discreditable fabrication on a person” but “publication of a fact prejudicing person’s rights or reputation, the non-veracity of which the offender was aware of”. Thus, “prejudicing person’s rights or reputation” substitutes the expression “discreditable”. Reprehensibility of the published data need not always be of importance from the injured person’s point of view. The publication of morally absolutely neutral false data on a person may also seriously damage him or her.<sup>21</sup>

Insult is not any more just “demeaning of one’s honour and dignity” but “vilification” which may include the

revelation of imperfection of person's appearance or character, aggressive and by-all-means criticism of his or her activities, deprecation of the profession and others.<sup>22</sup>

The protection of the deceased in criminal law is generally recognised. In many states this question is resolved by different *corpora delicti* (§ 189 of the German Criminal Code, *Rikoslaki* § 27:4). Pursuant to the interpretation of § 129 of the Estonian Criminal Code, the issue is covered by the *corpus delicti* of defamation.<sup>23</sup> The draft Criminal Code dedicates to the problem even a separate division in the chapter on offences against the person (Division IX entitled "Offences Against the Deceased") and foresees three *corpora delicti*: maltreatment of the corpse, disgracing the memory of the deceased, and illegal removal of cadaver organs with the aim of transplantation. The *corpus delicti* of disgracing the memory of the deceased is formulated as the hindrance of the performance of funeral ceremony, grave robbing or robbing of other last resting place or theft of an object thereof. Thus, it cannot be precluded that the act directed against the honour of the deceased may be qualified also in accordance with the *corpora delicti* of Division IV of the draft Code.

In legal literature it is widespread to consider a legal person as the holder of honour and, consequently, as the injured person. Although the notion "honour" is defined through human dignity, it has been expanded to cover legal persons on the grounds that the activities of legal persons are also socially assessed and this includes moral aspects - "they can operate normally only because they are not discredited".<sup>24</sup>

The German Criminal Code refers to the legal person's protection of honour in criminal law in §§ 194(3) and (4) that pertain to persons who are entitled to sue. The commentaries to the Estonian Criminal Code exclude this possibility.<sup>25</sup> Recently it has been alleged in legal literature that it is not possible to consider the prejudice of honour of a legal person as a crime.<sup>26</sup> As far as the draft Criminal Code foresees criminal responsibility of a legal person and stresses thereby the capacity of a legal person it can be assumed that the theory and court practice will begin to recognise a legal person as the person who has its honour.

## Notes:

<sup>1</sup> J. Peglau. Der Schutz des allgemeinen Persönlichkeitsrechts durch das Strafrecht. Frankfurt/M, 1997, p. 26 ff.

<sup>2</sup> Põhiõiguste süstematiseerimisest Eesti õiguses ja õigusteaduses. (On Systematisation of Fundamental Rights in Estonian Law and Jurisprudence.): R. Maruste. Põhiseadus ja selle järelevalve. (Constitution and its Review.) Tallinn, 1997, pp. 75-76; K. Merusk, R. Narits. Eesti konstitutsiooniõigusest. (On Estonian Constitutional Law.) Tallinn, 1998, pp. 172-189.

<sup>3</sup> Peglau, p. 6. Another position: E. Kergandberg. Au ja väärikus: kriminaalõiguslik kaitse. (Honour and Dignity: Protection in Criminal Law.) Report in a seminar of the Supreme Court. Tartu, 1998, p.1.

<sup>4</sup> Eesti Vabariigi Põhiseaduse eesti- ja inglisekeelne paralleeltekst. (Estonian and English Parallel Text of the Constitution of the Republic of Estonia.):

Republic of Estonia. Constitution. Tallinn, 1993.

<sup>5</sup> Inserted in the Criminal Code by the Act of 21 January 1999. — RT (Riigi Teataja = State Gazette) I 1999, 10, 156.

<sup>6</sup> RT I 1997, 51, 824. Q.v. for details: J. Sootak, M. Kurm. A Wish to have a Baby and the Dignity of the Child and Embryo. — European Journal of Health Law 1998, 5, 191 ff.

<sup>7</sup> E.g.: M. Shargorodski. Prestupleniya protiv zhizni i zdorovya. Moscow, 1948, p. 412 ff.

<sup>8</sup> Strafrecht der Deutschen Demokratischen Republik. Kommentar zum Strafgesetzbuch. Berlin, 1987, § 153, Komm 1.

<sup>9</sup> RT I 1998, 107, 1766.

<sup>10</sup> Novoye ugolovnoe pravo Rossii. Osobennaya tshast. Moskva, 1996, p. 56.

<sup>11</sup> Karistusseadustik. Eelnõu. Seletuskiri (Criminal Code. Draft. Explanatory Note) (M. Kurm), p. 35. Not published; manuscript is in the Department of Criminal Law of the Ministry of Justice of the Republic of Estonia

<sup>12</sup> R. Maurach, F. C. Schroeder, M. Maiwald. Strafrecht. Besonderer Teil. T. 1. 7. Aufl. Heidelberg, 1988, p. 123.

<sup>13</sup> A. Schönke, H. Schröder. Strafgesetzbuch. Kommentar. 25. Aufl. München, 1997, Vor § 234, Rn 2.

<sup>14</sup> Q.v. for details: F. Küper. Strafrecht. BT. Definitionen und Erläuterungen. München, 1996, pp. 86-88.

<sup>15</sup> Q.v. also: Strafgesetzbuch und Nebengesetze (Dreher/Tröndle). 46. Aufl. München, 1993, § 235, Rdn. 2.

<sup>16</sup> On the notion of "stealing of a child" (as to its differences from traditional theft) and its distinction from hostage taking and blackmail, q.v.: Riigikohtu lahendid. (Decisions of the Supreme Court.) 1997, 63. On stealing of a child, q.v. also: Eesti NSV Kriminaalkodeksi. Kommenteeritud väljaanne. (Criminal Code of the Estonian SSR. Commentaries.) Compiled by I. Rebane. Tallinn, 1980, commentaries on § 124.

<sup>17</sup> The Estonian legal literature accepts honour as a fundamental right. Q.v. for example: T. Sild. Kuriteod au ja väärikuse vastu. (Crimes Against Honour and Dignity.) — Juridica 1997, No. 9, p. 450; E. Kergandberg, pp. 1-2.

<sup>18</sup> This is also stressed in the commentaries to the Criminal Code: Criminal Code (Rebane), § 129, commentary 2a.

<sup>19</sup> Q.v. for example: F. Küper, p. 71; H. J. Hirsch. Grundfragen von Ehre und Beleidigung. — Festschrift für E. A. Wolff. Springer, 1998, p. 125 ff.

<sup>20</sup> This question also remains open in the chrestomathic Tammer case. Q.v.: Riigikohtu lahendid. (Decisions of the Supreme Court.) 1997, 115.

<sup>21</sup> Karistusseadustik. Eelnõu. Seletuskiri. (Criminal Code. Draft. Explanatory Note.) (M. Kurm), p. 34.

<sup>22</sup> Kurm, p. 35.

<sup>23</sup> Criminal Code (Rebane), § 129, commentary 2a.

<sup>24</sup> Küper, pp. 46-48.

<sup>25</sup> Criminal Code (Rebane), § 129, commentary 2b.

<sup>26</sup> T. Sild, p. 452.